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No. ——

IN THE
Supreme Court of the United States

S. REBECCA DACHMAN, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

S. REBECCA DACHMAN, M.D.
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73PP

QUESTIONS PRESENTED

1. Does the lack of an investigation by government officials prior to filing a criminal complaint constitute negligence and is therefore not barred by the intentional tort exemptions in 2680(h)?

a. To state a claim of negligence with respect to the filing of a criminal complaint is it relevant whether the tortfeasor is an investigative/law enforcement official or a non-investigative government official?

b. Does the need for an investigation prior to filing a criminal charge have to be defined by Agency regulation or is the 4th and 5th Amendment of the Constitution sufficient notice of duty to state a claim?

c. Is it supervisory negligence to allow a non-investigatory/non-law enforcement government official to file criminal charges without an investigation and without authorization from the U.S. Attorney and by corollary is such action not "under the scope of employment"?

LIST OF PARTIES

Petitioner is S. Rebecca Dachman, M.D.

The respondent in this case is the United States of America.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner, S. Rebecca Dachman, M.D. states she has no parent corporation.

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v.

UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit in S. Rebecca Dachman, M.D. v. United States of America is reprinted in Appendix A. The Order of the Court denying Plaintiff's Petition for Rehearing and suggestion for Rehearing In Banc is reprinted in Appendix C. The Order denying Plaintiff's Motion for Reconsideration is reprinted in Appendix D. The Memorandum Opinion and Order of the District Court dismissing the case is reprinted in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1998. The judgment of the Court of Ap-

peals denying Plaintiff's Petition for a Rehearing and Suggestion for Rehearing In Banc was filed on February 8, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Statutes regarding the Federal Tort Claims Act are 28 U.S.C. § 1346(b), and 28 U.S.C. § 2671-80. Additional relevant statutes are 4 U.S.C.A. and 5 U.S.C.A., 18 U.S.C. § 1001 and 5 CFR § 752.404.

INTRODUCTION

The Federal Tort Claims Act stems from a series of legislative directives to limit the extent of sovereign immunity that government officials have and to demand accountability on the part of government actors. Though the doctrine of "sovereign immunity", which is rooted in English doctrine, was supported by Chief Justice John Marshall, in *Cohens v. Virginia*, 19 U.S. 264 (1821), by 1855 the federal government recognized that an absolute bar against suit was impractical and began the first series of legislative modifications that demanded accountability on the part of government officials who operate under the scope of employment/color of law. They therefore passed the Court Claims Act. The Federal Tort Claims Act, which was passed in 1946 arose from the Driver's Liability Act which granted immunity to government drivers acting under the "scope of their employment". It permitted recovery against the United States for negligent acts (and trespass and invasion of privacy) that occurred while the tortfeasor was under the "scope of employment". In 1974, after an incident in Collinsville, Ill. that involved violation of constitutional rights, public outcry resulted in an amendment that made law enforcement and investiga-

tive federal officials liable for malicious prosecution, false arrest, abuse of process, assault, battery and false imprisonment, which until then had been barred. At the time, the Justice Department had wanted to extend liability to all federal officials on these counts. The amendment conferred relief to plaintiffs under the FTCA for violations of constitutional rights by the United States, much as Bivens actions allowed relief from individual government officials for violation of constitutional rights. Congress and the Courts supported the availability of both remedies for violation of constitutional rights.

Since 1974, in a series of critical Court decisions, this Court has defined the contours of negligence with respect to the FTCA and has refined the definition of actions that are exempt under the law because they "arise out of" an exempted intentional tort. The refinements have focused on two aspects of the term,

a. delineating the tortfeasor, and

b. clarifying the conduct that constitutes negligence.

In *United States v. Muniz*, 374 U.S. 150, liability for exempted intentional torts could be imputed to the government only if the tortfeasor was a non-government employee. In *Sheridan v. United States*, 487 U.S. 409, the Court redirected interpretation of the term "arise out of" to the conduct and concluded that the government was liable where there was a duty defined by regulation irrespective of the employment status of the tortfeasor. This decision discussed the concept of "supervisory negligence" as a tort and maintained that even if in a mileu where the government would be liable for supervisory negligence, immunity would still be maintained for torts arising solely out of the doctrine of "respondeat superior". The Court's decision in *Sheridan*, supra, highlighted the existant confusion which obfuscated the distinction between duty,

supervisory negligence and respondeat superior in delegating responsibility for tortious government activities.

In the case at bar, a criminal complaint was filed against a government official prior to any meaningful investigation, precipitating a series of personal and professional setbacks, resulting ultimately in removal from federal service. The case deals with 4 critical issues:

> I. Does the lack of an investigation by government officials prior to filing a criminal complaint constitute negligence and therefore is not barred by the intentional tort exemptions in 2680(h)?
>
> a. Does the requirement to investigate have to be defined in regulation or is the constitutional amendments regarding due process sufficient?
>
> b. Is there a difference if the individuals filing the complaint was an investigative official versus and non-investigative official?
>
> c. Is it supervisory negligence to allow a non investigatory law enforcement official to file criminal charges without authorization from U.S. Attorney and is that "under the scope of their employment"?

STATEMENT OF THE CASE

A. Nature of the Case

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuits entered in this case on February 8, 1999 that affirmed the District Court's dismissal of Plaintiff's FTCA complaint for lack of subject matter jurisdiction. The District Court has stated that the claim of negligence was an attempt to recast a tort "arising out of" malicious prosecution and false arrest as negligence. Citing *United States v. Shearer*, 473 U.S. at 52 and *Thigpen v. United States*, 800 F.2d 393. The District Court erroneously

concluded and the Appeals Court upheld, that Plaintiff's claim that the United States/FDA was negligent when W. Schwieterman was given permission to go to the Commissioner and file criminal charges against Dr. Dachman without any meaningful investigation, was a recasting of torts that are exempted under § 2680(h).

B. Statement of Fact

Dr. Dachman was employed by the FDA as a medical officer from June, 1988 until her termination in February, 1998. Until her arrest in July, 1994 Dr. Dachman's evaluations were excellent to outstanding and she was considered an expert in her area. In June 1994, the largest project ever submitted to FDA, which Dr. Dachman had been working for 4 years, was unanimously approved for licensure. Shortly thereafter Dr. Schwieterman, who had significantly less seniority than Dr. Dachman became her immediate supervisor and began harassing her over trivial matters. One such matter was an unnecessary apology he requested she write. When Dr. Dachman persisted in nagging him to explain her point of view, he precipitously called security. Dr. Dachman at all times quietly complied with security's requests and later that evening the security guard suggested she file a complaint against her supervisor and signed a note for her. Two days later, on July 15, 1994, W. Schwieterman, without any intervening events, accused Dr. Dachman of leaving a threatening message on his answering machine. W. Schwieterman immediately notified his superiors, the Office of Internal Affair (who recorded the call), the Office of Criminal Investigations, Security, the FBI, and the local police. 72 hours later, before the completion of any investigation and 1-2 hours before the police going to interview Dr. Dachman per W. Schwieterman's request, W. Schwieterman went to the Commissioner to file a criminal com-

plaint (App. E). The complaint contained false statements [1] including the "motive" for the "threatening call" (App. E). W. Schwieterman also withheld from the police and the Commissioner that the call came from an "outside" line which he believed meant outside FDA building (App. F, 18a) and Dr. Dachman was never asked her whereabouts at the time the call came in, or told of the call, prior to the filing of criminal charges, though she was in contact with W. Schwieterman and other superiors on several occasions after the call came in. This is critical because Dr. Dachman was in a colleague's room at the time. Based on the complaint a warrant for Dr. Dachman's arrest was issued. Dr. Dachman did not make the call nor was she involved in the making of the call thereof. Dr. Dachman was arrested 4 days after the warrant had been signed. The charges against her were nolle prosequi in December 1994 and a subsequent Office of Internal Affairs investigation, which was initiated after the case was nolle prosequi, concluded in May, 1995 that the charges against her were unsubstantiated. Over the next several years Dr. Dachman was subjected to multiple disciplinary actions, was ultimately removed from Federal service and went through a divorce after 18 years of marriage. Unemployed, she is the sole parent in Maryland of 3 children under the age of 14.

As a matter of law Dr. Dachman contends that the Agency was negligent when it did not do an investigation before filing charges and demonstrated supervisory negligence when it allowed W. Schwieterman to file charges before the completion of any investigation or asking Dr. Dachman her whereabouts. In addition W. Schwieter-

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[1] Dr. Dachman NEVER punch her hand through a wall. The government has alleged that damage behind a doorknob was caused by her which she disputes. Dr. Dachman did though once yell loudly in the bathroom thinking it was soundproof (it wasn't).

man's wilful and knowing false statements under oath in the charging papers including the "motive" which was that Dr. Dachman was aware of a pending reprimand or suspension constitutes "fraud" and possibly "fraud on the Court" (all disciplinary actions occurred after the warrant had been signed (App. F, 17a).

In this petition Dr. Dachman respectfully requests that this honorable Court reverse the decision and orders of the lower Courts, remand the case and rule that:

1. It is negligence when government officials file criminal charges without any preceding investigation and that negligence is actionable under the FTCA.

a. The negligence applies to either law enforcement or non-law enforcement officials.

b. Allowing a non-investigatory/non-law enforcement official to file a criminal charges prior to any investigation and without authorization from the U.S. Attorney constitutes supervisory negligence.

c. Independent filing of criminal charges without authorization from the U.S. Attorney is not "under scope of employment."

d. The 4th and 5th Amendments constitute sufficient showing of duty to state a claim of negligence in any state since it is incorporated into state law by the 14th Amendment.

C. Procedural History

The facts of this case arise under 28 U.S.C. § 1346 and § 2671-80. 28 U.S.C. § 1346 and § 2679 substitute the United States as party defendants, if the action occurred "under the scope of employment". In December, 1997, Dr. Dachman filed a 2 count complaint against the United States in District Court in Maryland alleging negligence and intentional infliction of emotional distress. The

United States moved to dismiss the complaint in March, 1998 based on lack of subject matter jurisdiction. In April, 1998 the Court did dismiss the action based on lack of subject matter jurisdiction stating the claims "arose out of" the exempted intentional torts. Plaintiff moved for reconsideration which was denied. Plaintiff then appealed the decision to the 4th Circuit Court of Appeals in Richmond. The Appeals Court affirmed, without opinion, the District Court's decision in November, 1998 and denied a Petition for Rehearing on February 8, 1998.

REASONS FOR GRANTING THE WRIT

The District Court stated that Plaintiff's claim of negligence "arose out of" the exempted torts of malicious prosecution, false arrest and abuse of process and therefore was statutorily barred under the FTCA. This essentially allows the government to abdicate any responsibility for an arrest that had no preceding investigation. Such behavior is absolutely inconsistent with the basic tenets of our democratic society and the 4th and 5th amendments of the U.S. Constitution. Plaintiff therefore respectfully disputes the District Court's decision. It is clear from the legislative history of the FTCA, that both Congress and the Courts intended the FTCA to mandate accountability from government officials acting in the "scope of their employment". Moreover, it is apparent that responsibility of government officials to protect constitutional rights is preeminent in the Court's and Congress' determinations. Because of the evolving concepts involved in scope of FTCA responsibilities and the continuing confusion with respect to the correlation between negligence and actions that "arise out of" an intentional tort, grant of certiorari is warranted to provide essential guideposts regarding the relationship of the actions barred under 28 U.S.C. § 2860(h) to the conduct, tortfeasor and victim involved

in the intentional tort, especially when constitutional rights are involved.

I. CONTRARY TO THE OPINION CITED BY THE DISTRICT COURT AND AFFIRMED BY THE APPEALS COURT LACK OF AN INVESTIGATION BY GOVERNMENT OFFICIALS PRIOR TO FILING A CRIMINAL COMPLAINT CONSTITUTES NEGLIGENCE AND IS NOT BARRED BY THE INTENTIONAL TORT EXEMPTIONS.

It is the nexus of duty, place and temporal association that is integral to interpreting FTCA actions and the scope of the bar on intentional torts in 28 U.S.C. § 2680(h). In particular it is the term "arising out of" that has been the subject of debate regarding the breadth of the bar. Courts have used terms such as "stems from", "essential element of", "from", to attempt to define the ambit of the bar. The critical aspect though of the term "arises out of," that may illuminate interpretation and implementation of the bar, is the temporal relationship (in place and date) between the acts complained of, and the intentional tort. A major consideration in the temporal relationship paradigm is whether the events complained of pre-date the intentional tort or did they occur concurrently or after the intentional tort? This standard is consistent with the plain meaning of the word "arises" [2] which would indicate that the index intentional tort is the initial point of reference. In negligence cases, there are duties regulating government activities and duties to the victim that existed before the intentional tort occurred and had they been adhered to would have averted the intentional tort. Those pre-existent "duties" are the initial point of reference. This paradigm not only reconciles the differences in interpreting FTCA actions with

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[2] Webster's New Encyclopedia of Dictionaries Ottonheimer Publishers, Inc. (1993).

respect to motor vehicle accidents, see *Heredia v. U.S.* 887 F. Supp. 77, which have a much lower standard of proof of responsibility derived from the FTCA's original genesis in the Driver's Liability Act, to that of negligence related to torts, but also maintains the bar against actions based solely on the doctrine of respondeat superior. Under this model *Sheridan*, supra, would, as did occur, represent negligence because the duty to ban firearms predated the intentional tort. *Mulloy* 884 F. Supp. 622 would also not be barred again because the negligence in not appropriately screening potential soldiers, predated the intentional tort and the intentional tort of assault was temporally and physically associated with government employment. This would also be consistent with the Court's decision in *Bembinista v. U.S.*, 866 F.2d 497, where a hospital was found negligent when a comotose patient was raped. Under this theory actually *Thigpen*, supra would have been a case of negligence since there was a criminal history as would *Kenna v. United States*, 927 F. Supp. 62 where the assailant was on the job at the time of the tort and had a known psychiatric history, but cases like *Bajkowski v. U.S.* 787 F. Supp. 539 (1991) where the only relationship was that of respondeat superior and *Wise v. U.S.* 8 F. Supp. 2d 535 (1998) would still be barred. The decision in *Hokansen v. U.S.* 868 F.2d 373 would be unchanged since the intentional tort occurred so far removed from assailant's relationship with the government. In *Miami North v. U.S. Department of Labor*, 939 F. Supp. 53, the decision would be affirmed since the action did not occur on government property and the assailant was effectively "contracted out" to the arcade.

The temporal standard described above would also streamline the role of negligent supervision in negligence versus the role of respondeat superior. Significantly, it would obviate the need for the distinctions regarding the

government employment status of the assailants which has complicated interpretation of the law and which the Court have been whittling away at over the years. This "temporal" criterion is consistent with the standards involved in negligence, and would substitute just the government, as the comparator, to a private individual which is the cornerstone of the FTCA.

The model presented above is reflects the facts in Plaintiff's case and substantiates that there was indeed negligence that preceded the filing of the criminal complaint. The government had duties described in the Staff Manual Guidelines and Regulations (App. G). Furthermore the 5th Amendment (App. L) of the Constitution does make it a duty incumbent on federal officers to safeguard "due process" rights, which would require an investigation prior to an arrest for an unwitnessed crime. Mere suspicions alone would not be enough to implicate Plaintiff if exculpatory evidence was available. In *Dunaway v. New York*, 99 S. Ct. the court indicated common rumor or report, suspicion or even strong reason to suspect was not adequate to support a warrant for an arrest and in *Dunnington v. Department of Justice*, 956 F.2d 1157 the Court stated "given the reality of the manner in which the arrest warrants often issues it is incumbent upon the Agency when an arrest warrant is a major part of the case to assure itself that the surrounding facts are sufficient to justify summary action by the Agency. Also see *Montgomery Ward v. Frances Wilson*, 101 Md. Ap. 535 (. . . probable cause does not exist if a proper investigation could have cleared the accused."), *Clipper v. Takoma Park, Md.*, 867 F.2d 17, (where officer failed to investigate exculpatory leads such as prints from bank surveillance) and *Seigny v. Dicksey*, 846 F.2d 953, (an officer lost qualified immunity because he failed to avail himself

to readily available information which would have confirmed Plaintiff's explanation of events).

A. To state a claim of negligence for filing a criminal complaint is it relevant whether the tortfeasor is an investigative/law enforcement official or an non-investigative government official?

In stating a claim of negligence there must be a duty that has been breached. The duty in this case is defined by both Agency regulation and the Constitution. If it is held that Agency regulations are critical to establish a duty for failure to investigate before filing criminal charges then the status of the tortfeasor as an investigatory agent is important since the explicit Agency duty to investigate and or protect due process rights was not specified for the all parties involved. Officers in the Office of Internal Affairs (OIA) and the Office of Criminal Invesigations (OCI) are investigative personnel and have specific responsibilities related to initiating and coordinating investigations (App. G). Employees from the Employee relations Branch, who were aware of the "threat call" have a responsibility to protect all employees due process (App. I). All of these officers and all Plaintiff's supervisors also have the duty to safeguard constitutional rights. In all these areas government officials were highly negligent. Significantly, since the officers from OIA and OCI are investigative officers they are not barred from the intentional tort claims related to arrests stated in 2680(h) and therefore negligence on their part should not be barred, see *Zerbe v. State*, 578 P.2d 597 (negligence claim based poor recordkeeping that resulted in an arrest and jail for a bench warrant that had been satisfied). The other government officials, who are not law enforcement officials but are involved in the case could also be held accountable for negligence as occurred in *Bobo v. State*, 697 A.2d 1371, 346 Md. 706 (negligence in failing to recall

warrant authorization, in this case the recall was found to be discretionary).

B. Does the duty for an Agency investigation have to be defined by Agency regulation to be actionable or are the Constitutional amendments sufficient notice of duty?

In a dissent in *Albright v. Oliver*, 114 S. Ct. 807, Justice Stevens concluded "formal commencement of a criminal proceeding . . . an official accusation of serious crime has a direct impact on a range of identified liberty interests, that impact moreover is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection". In *Greene v. Elroy*, 360 U.S. 474 the Court stated "In the area of questionable constitutionality this Court will not hold that a person may be deprived of the right to follow his chosen profession without full hearing where accusers may be confronted and cross-examined . . ." and in *Hannah v. Larche*, 363 U.S. 470 stated that when a federal agency is contemplating an adjudicative process that will change legal status "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." It appears therefore that with respect to investigations that are related to criminal charges, based on the Constitution alone, the Agency has a imperative to investigate and Agency regulation may be superfluous, though having regulations that require investigations performed before filing charges demonstrates the significance of investigations in criminal proceedings. Not to investigate is not only a violation of constitutional rights but highly negligent.

C. Does allowing a non-investigatory/non-law enforcement government official to file criminal charges without an investigation and without authorization from the U.S. Attorney constitute supervisory negligence and by corollary is such action not "under the scope of employment"?

Based on the temporal algorithm above, since regulatory criteria to investigate existed, and supervisory personnel gave permission, it would be supervisory negligence to allow an non-investigatory/non-law enforcement government official to file a criminal complaint without an investigation. In addition a substantial body of law indicates that it would not be under the scope of employment since there would have be authorization from the U.S. Attorney see *Van Schaick v. United States* 586 F. Supp. 1023 or the U.S. Attorney would do so himself, *Novak v. Department of Treasury*, 12 M.S.P.R. 455. Moreover "scope of employment" extends only to such activities as authorized by statute, see *Jordan v. Hutcheson*, 323 F.2d 597 (any act not authorized by state law would not have the cloak of legislative immunity) and can only be activities that the master can control and after W. Schwieterman left the workplace his supervisors could not control what was written. *Sawyer v. Humphries*, 322 Md. 257, 587 A.2d 471, also see *Cooper v. O'Connor*, 107 F.2d 207 (acts of a public officer are performed within the scope of official duties if such acts are done in relation to matters committed by law to the officer control . . . or are governed by lawful requirements of a department under whose authority officer is acting). From the facts in this case it appears that since the filing of a criminal complaint was not preceded by an investigation or proper authorization, it was not "under scope of employment" and the fact that supervisors allowed W. Schwieterman to leave the worksite to file a complaint represents supervisory negligence.

CONCLUSION

The criteria that distinguish negligent actions that are barred under the exempted torts in 28 U.S.C. § 2680(h) from those that are permitted is still obscure. It the case at bar based on a paradigm of temporal relationships, the lack of an investigation prior to filing criminal charges was negligent act and should not have been barred by the exempted torts cited in § 2680(h). Granting certiorari by the Court is warranted to streamline the criteria used to distinguish barred from non-barred claims and would provide an algorithm that would maintain consistency in judicial judgments with respect to FTCA in all circuits. Therefore, Plaintiff respectfully requests that this Honorable Court grant certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-1833

S. REBECCA DACHMAN,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt
Peter J. Messitte, District Judge (CA-97-4352-PJM)

Submitted: November 5, 1988
Decided: November 18, 1998

Before ERVIN, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

S. Rebecca Dachman appeals the district court's order dismissing this civil action. We have reviewed the record

and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Dachman v. United States, No. CA-97-4352-PJM (D. Md. May 5, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. PJM 97-4352

S. REBECCA DACHMAN, M.D.,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

MEMORANDUM OPINION

I.

Plaintiff Dachman, formerly a medical officer employed by the Food & Drug Administration ("FDA"), filed her *pro se* Complaint on December 30, 1997, alleging—in essence—that the United States' negligence in failing to conduct a competent investigation of charges made against her by her supervisor at FDA caused her emotional distress and other damages. Defendant has filed a Motion to Dismiss, Plaintiff has opposed, and Defendant has filed a Reply. Upon consideration, Defendant's Motion will be GRANTED.

II.

Plaintiff alleges that on July 15, 1994, William Schwieterman, her supervisor at FDA, accused her of leaving a threatening message on his answering machine at work. Police were summoned and Schwieterman subsequently registered a complaint against Plaintiff on July

18, 1994. It is undisputed that these criminal charges were eventually nolle prossed. However, Plaintiff also alleges vaguely that she was "improperly disciplined" as a result of Schwieterman's allegations.

It is axiomatic that no action may be brought against the federal government for certain "excepted torts"—among them malicious prosecution and abuse of process. 28 U.S.C. § 2680(h). Nor can an action be brought for a claim that "arises out of" malicious prosecution or abuse of process. *United States v. Shearer*, 473 U.S. 52, 55 (1985); *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986) (dismissing suit alleging negligent supervision of naval hospital employee who allegedly sexually molested two minors—claims arose out of excepted torts of assault and battery). Dachman's first claim, though styled "Negligence-Negligent Conduct," clearly "arises out of" an allegation of malicious prosecution or abuse of process. Therefore, it must be denied. Moreover, insofar as her second claim similarly arises out of an "excepted tort," it too must be dismissed. *Harms v. United States*, 1992 WL 203942 (4th Cir. 1992) (dismissing intentional infliction claims that arose out of enumerated excepted torts).

Finally, Plaintiff appears to allege intentional infliction of emotional distress arising out of the wrongful or at least negligent institution of disciplinary proceedings against her—a point Defendant fails to address in its Motion. However, her allegations here are quite murky: nowhere does she allege that Defendant owed her a duty to conduct a more thorough investigation than it did before instituting disciplinary proceedings against her. Nowhere does she allege that the procedures FDA took—such as placing her on administrative leave and displaying her picture at the security desk—were unreasonable or

"negligent." Finally, nowhere does she suggest that Defendant's investigation into the alleged threatening phone call was itself negligently conducted: indeed, she is quick to point out that Defendant ultimately concluded that the charge was "unsubstantiated." To the extent she raises any claim in regard to the disciplinary action, then, she has failed to allege any breach of a duty owed her.

A separate order will issue implementing this opinion.

Date: 4/30/98

/s/ Peter J. Messitte
PETER J. MESSITTE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. PJM 97-4352

S. REBECCA DACHMAN, M.D.,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

ORDER

Upon consideration of Defendant's Motion to Dismiss, Plaintiff's Opposition, and Defendant's Reply, it is this 30th day of April, 1998,

ORDERED that Defendant's Motion is GRANTED, and it is further

ORDERED that Plaintiff's Complaint is DISMISSED, and it is further

ORDERED that the Clerk shall CLOSE this case.

/s/ Peter J .Messitte
PETER J. MESSITTE
United States District Judge

APPENDIX C

FILED February 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1833
CA-97-4352-PJM

S. REBECCA DACHMAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON PETITION FOR REHEARING
AND REHEARING EN BANC

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
PATRICIA S. CONNOR
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. PJM-97-4352

S. REBECCA DACHMAN, M.D.
Plaintiff Pro Se

v.

UNITED STATES OF AMERICA
Defendant

PLAINTIFF'S MOTION AND MEMORANDUM FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER GRANTING THE UNITED STATES' MOTION FOR DISMISSAL OR IN THE ALTERNATIVE SUMMARY JUDGMENT

Motion "DENIED" this 16 day of June, 1998.

/s/ Peter J. Messitte
PETER J. MESSITTE
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM DAVID SCHWINTERMAN M.D.
9501 Hollins Ct.
Bethesda, MD 20817
Complainant/Applicant

v.

SARAH REBECCA DACHMAN
1451 Rockville Pike
Rockville, MD 20852
CC# R94.159534
Defendant

DEFENDANT'S DESCRIPTION: Driver's License #—————— Sex F Race W Ht. 5'2 Wt. 150 Hair Dark Eyes Dark Complexion Fair Other Weavy hair cut short heavy-set D.O.B. 11-23-54 ID ————

APPLICATION FOR STATEMENT OF CHARGES

I, the undersigned, apply for a statement of charges and a summons or warrant which may lead to the arrest of the above named Defendant because on or about July 15, 1994 at 1:15 pm at 1451 Rockville Pike, Rockville, MD. at the FOA, the above named Defendant Sarah Rebecca Dachman I believe left a message on my voice mail threatening me with my *life*. The words I discovered on my voice mail (approximately at 1:30 pm, said "*Hi, I'm going to haunt you. Be afraid. I at your house, so be*

afraid. You will kill you." My telephone service identified the time of receipt of the message as 1:15 pm.

(Continued on attached—pages) (DC/CR 1A)

I solemnly affirm under the penalties of perjury that the contents of this Application are true to the best of my knowledge, information and belief.

Date 7/18/94 — Officer's Signature

I have read or had read to me and I understand the Notice on the back of this form

William D. Schwinterman MD

Date 7/18/94 — Applicant's Signature

Subscribed and sworn to before me this 18 day of July, 1994 Time 1:58 PM Commissioner D. Willer I.D. 6501.

I understand that a charging document has been issued and that I must appear for trial ☐ on _____ (Date) at _____ (Time)

☐ when notified by the Clerk, at the Court location shown at the top of this form.

Applicant's Signature

☐ I declined to issue a charging document because of lack of probable cause.

Date — Commissioner

No Witnesses to threat—only listeners to the Recording

Name	Number and Street/Agency/ Sub-agency/I.D.	City, State, Zip

Dr. Dachman is an employee of mine, and I am her direct supervisor. Her voice is distinctive, and though the message used inappropriate syntax, and the *suspect appeared to take efforts to conceal her voice*, there was no mistaking the threat of bodily harm implicit in her message. Others (including my immediate supervisors) had strong suspicions about the suspect being the perpetrator of this call. The *reasons for this suspicion, in addition to voice recognition is stated below.*

Dr. Dachman has a history of problematic behavior and performance in the workplace. She was recently issued a *memorandum* (*dated 6/16/94*) outlining problems in many areas, including violence. *Dr. Dachman punched her hand through a bathroom wall on November 18th, 1993* after she became angry over a work-related incident. More recently, Dr. Dachman had to be *escorted* from my office (by a security guard) *twice* because she failed to comply with my wish for her to leave. A *letter of reprimand, and possible suspension from employment, is pending. I believe she threatened my life in response to these recent disciplinary actions.*

NOTICE TO APPLICANT FOR A CHARGING DOCUMENT

You are making an application for a charging document which may lead to the arrest and detention of the individual you are charging. If, as a result of your application, a charging document is issued by the commissioner, it will not be possible for the commissioner to withdraw the document. The charge may only be disposed of by trial or by action of the State's Attorney.

You will be required to appear at the trial as a witness. Failure to appear on the date set by the court could result in your arrest for failure to obey a court order.

The application which you are filing is being filed under oath. Article 27, Section 151, of the Annotated Code of Maryland provides that any person who makes a false statement or report of a crime or causes such a false report or statement to be made to any official or agency of this State, knowing the same, or any material part thereof, to be false, and with intent that such official or agency investigate, consider or take action in connection with such statement or report, shall be subject to a fine of not more than $500, or be imprisoned not more than six months, or be both fined and imprisoned, in the discretion of the court.

It is essential that you furnish as much information as possible about the offense. To be sure that your information is adequate, your application should clearly state the following:

1. WHO?

   Identify the accused, (the person you are complaining about), and identify yourself.

2. WHEN?

   The time, day, month and year of the offense.

3. WHERE?

   The exact address and street, the city, county and state where the offense happened. Also state whether the offense happened in a private home or in some public place.

4. WHAT?

   State exactly what was done to you. For example: if property was taken, describe it and its value, or, if property was damaged or destroyed, indicate the original cost of the item or its replacement value. If you do not know the exact value, estimate it as accurately as possible.

5. WHY?

   The facts you give *must* show the accused intended to commit a criminal act.

6. HOW?

   How the accused committed the offense. For example, if you were physicallly assaulted, were you struck with a fist, a flat hand, kicked, or pushed, or were you struck with an object, such as a club or pipe, etc.? If property was taken, how did the accused get it? If it was destroyed or damaged, how did the accused cause the damage?

7. At the top of the application, you will notice a space marked "DESCRIPTION." The information in this space refers to the accused. It is important to furnish as much of this as possible so that the accused may be easily identified.

If you need further assistance in completing your application, pleace feel free to ask the commissioner.

APPENDIX F

Deposition of William Schwieterman
Dated February 4, 1997

[226] A How would Dr. Dachman know of these pending actions?

Q Right.

A I don't know that she did or didn't and I can't recall exactly what my conversation with Cindy Lepson was about those actions.

Q Well, you say here in the last sentence, "I believe she threatened my life in response to these recent disciplinary actions." So, my question is why would she have threatened your life if she didn't even know about these pending disciplinary actions?

MR. RUSSELL: Objection. You can answer.

A My memory is not clear as to what Dr. Dachman did or didn't know, there.

Q Well, you didn't even know of any disciplinary action, did you?

MR. RUSSELL: Objection. This states a testimony. And I instructed the witness to answer.

THE WITNESS: It's unclear to me now about what I did or didn't know about possible disciplinary actions on Dr. Dachman.

BY MS. WEISS:

[227] Q But, at any rate, you never told Dr. Dachman that she was being reprimanded or there was possible suspension pending?

A I never told Dr. Dachman that.

Q Okay. Thank you. Okay. If we could mark this as Exhibit 21.

(Schwieterman Exhibit 21 was marked for identification.)

* * * *

Affidavit of William Schwieterman
Dated November 1995

* * * *

12. I deny having made any false statements with regard to her arrest and stand completely by my sworn testimony (see appendix #29) despite Dr. Dachman's allegations.

13. The circumstances leading up to the arrest are summarized in appendix #15, when the first altercation occurred. Appendix #23 is a copy of the correspondence sent by e-mail (dated July 11th, 1994). Appendix #26 is another summary of the events listed above.

    In sumary, I received a threatening phone call two days after the events documented in the correspondence included in appendices #15 and #23. I immediately reported these events to FDA Security, the Federal Bureau of Investigation, the Office of Internal Affairs of the FDA, and to the Montgomery County Police Commissioner (see appendix #18), as I believed (and still believe) Dr. Dachman to have threatened me and my family.

    I have no knowledge of the details regarding Dr. Dachman's suspension. I was not responsible or involved in this decision, and was merely asked to recount the events of early to mid July, 1994. As I stated earlier. I was under instructions from my supervisor and the Montgomery County Police to minimize my contact with Dr. Dachman, given the Complaint and potential litigation pending at the time. I complied with these instructions.

14. As stated above. I have no direct knowledge of why the Complainant was suspended, and was not re-

sponsible for or involved with any decisions made in this regard. Rather, I was asked by my supervisors only to recount the events of July 1994, and did not participate in discussions with them regarding the propriety of disciplinary action for Dr. Dachman.

Memo to File by J. Siegel
Dated July 22, 1994

Memo to File

Date: July 22, 1994

Re: Phone conversation with Dr. Dachman

From Jay Siegel

I telephoned Rebecca Dachman at her home while on Administrative Leave at 2:45 p.m. 7/22/94.

I initially informed her that her Administrative Leave was being extended until Wed. a.m. 7/27. She inquired why and I told her it was to allow me and others adequate time to plan appropriate disciplinary actions and to plan how to provide appropriate supervision for her work.

She asked what she was being disciplined for and I indicated that she would be informed in detail upon her return on 7/29 but that both her behavior on July 13th and several subsequent episodes of failing to follow instructions regarding telephone and verbal contacts, bringing documents to the workplace, and staying away from the workplace while on administrative leave. She noted that her visit to WOC II on the a.m. of 7/21 was at about 7 a.m. She also acknowledged that she had visited WOC I at about 8:30 on 7/22 which she noted was before core hours. I reminded her that my instruction of 7/20 was to avoid WOC I and II entirely.

Deposition of William Schwieterman

Q Now, you—did anyone press five on the threatening call to find out where it came from?

A I did.

Q When you got the call?

A Yes.

Q And what happened?

A I got information about the time and the location of the caller—the time the phone call was made.

[76] Q Okay. So, tell me about the location of the caller?

A The phone simply said that it was from an outside caller.

Q you mean outside FDA?

A I believe so. Yes.

Q And what did it specifically say?

A It was a very short message. I don't recall the exact words, but something to the effect that it was outside the system.

Q Outside the system? You mean—?

A The phone system.

Q Okay. So, that means outside the facility, the FDA?

A I believe so. Yes.

Q Okay. So, let me be clear on this. You pushed the button "5," it shows the number and then it says outside system? Is that what it says?

A A voice comes on after you press "5" telling you the time and the location of the caller. In this particular instance, it identified the location of the caller as outside the system. I don't know the exact [77] words, but I believe it was something to the effect of that this machine was not able to give me the exact number from which this call had been made, because the caller had placed the call from outside the system.

Q Did you ever learn what outside the system meant?

A No. I didn't inquire.

Q Did you ever tell anybody that you had heard this when you pressed button "5"?

A I told everyone all the relevant facts about this. And, so yes, I told my supervisors about this information.

Q And who else did you tell?

A I don't recall who exactly, but I believe Dr. Weiss and Dr. Siegel and—were both informed—as was Ms. Jennie Fox, who was working for Jeannie Colliton. We approached her about this and I probably, although I don't recall I gave her this information as well.

Q Who is Jeannie Colliton?

A I don't know her title. She worked—oh, who is Jeannie Colliton?

[78] Q Right.

A She works for—I don't know her title either. She works for the communications. She works with the communications within the FDA.

Q Those are the people in charge of the telephones?

A I believe so, yes.

Q But, as I understand your testimony, you're not sure if you told Jeannie Fox, who work for Ms. Colliton, about this message. It that correct?

A I'm not 10 percent certain. Oh, I told her about the message, but about the information gained from pressing "5" I probably told her that, but I'm not 100 percent certain.

Q Mm-hmm. Why didn't you put that information in any of your affidavits?

A Why didn't I?

Q Correct.

A There was a great deal of information put into the affidavits, so it didn't occur to me to include this data.

Q Did you try to save that message?

* * * *

APPENDIX G

STAFF MANUAL GUIDE
FOOD AND DRUG ADMINISTRATION

ORGANIZATION AND DELEGATIONS MANUAL

ORGANIZATION—
OFFICE OF THE COMMISSIONER

OFFICE OF REGULATORY AFFAIRS
OFFICE OF CRIMINAL INVESTIGATIONS

1. Office of Criminal Investigations
2. Area Offices
3. Authority and Effective Date

1. OFFICE OF CRIMINAL INVESTIGATIONS (HFA4D).

   a. Advises and assists the Associate Commissioner and other key officials on regulations and criminal matters that affect the Agency.

   b. Directs, plans, and develops criminal investigation activities in coordination with other Agency components and with other Federal, State, and local law enforcement agencies.

   c. Develops, coordinates, and implements Agency policy related to criminal investigations.

   d. Initiates and conducts criminal investigations under all statutes administered by the Food and Drug Administration, through area offices located

throughout the United States; coordinates assignments involving undercover and surveillance personnel and activities.

e. Assures coordination of criminal investigation activities with FDA Regional Field Offices and District Offices and adherence to Agency's enforcement priorities; develops and maintains cooperative relationships with field and Headquarters components.

f. Provides recommendations to the Office of General Counsel on referrals of criminal cases to the Department of Justice for further investigation and/or prosecution, or directly to the U.S. Attorney when such direct reference is authorized.

g. Develops automated data processing systems to be used for criminal investigations and related enforcement matters.

h. Develops, reviews, and approves training programs for FDA's criminal investigators and related personnel.

i. Participates in Grand Jury investigations and serves as agents of the Grand Jury.

2. AREA OFFICES (HFA4DN, HFA4DA, HFA4DS, HFA4DM, HFA4DW, HFA4DP).

a. Initiates, directs, plans, develops, and conducts criminal investigations activities under all statutes enforced by the Food and Drug Administration.

b. Assures coordination of criminal investigative activities with FDA's Regional Field Offices, District Offices, and other Agency units as appropriate, including the need for participation of FDA Dis-

trict Office personnel in criminal investigative activities. Maintains cooperative relationships with field and headquarters components.

c. Coordinates and maintains liaison on criminal investigative activities with other Federal, State, and local law enforcement agencies as appropriate.

d. Evaluates findings of a criminal investigation and determines appropriate follow up. Provides recommendations, in coordination with Office of Criminal Investigations, on referrals of criminal cases to the Department of Justice or the responsible U.S. Attorney for litigation. Assists in implementing approved actions.

e. Coordinates and implements Agency policy related to criminal investigations.

f. Provides investigational support to Headquarters components and across Area Office boundaries as needed.

g. Provides counsel and training regarding criminal investigative techniques, equipment, safety, and security to Agency personnel.

h. Participates in Grand Jury investigations and serves as agents of the Grand Jury.

i. Manages resource allocations, money, and people, and evaluates use of resources to assure program accomplishments. Advises the Director, Office of Criminal Investigations, on new or emerging problems and trends, program needs and priorities, manpower, equipment, financial needs, and FDA's long-range planning in the criminal investigative area.

j. Manages the Area Office data information system.

3. AUTHORITY AND EFFECTIVE DATE.

a. *Office Level.* The functional statements for this Office were approved by the Commissioner of Food and Drugs effective December 15, 1991 and published in the Federal Register (56 FR 67076) on December 27, 1991.

b. *Area Office Level.* The functional statements for the Area Offices in this Office were approved by the Associate Commissioner for Management on October 28, 1991.

* * * *

APPENDIX H

STAFF MANUAL GUIDE
FOOD AND DRUG ADMINISTRATION

Guide FDA h:2280.5

DIVISION OF MANAGEMENT SERVICES—
PHYSICAL SECURITY

REPORTS OF LOSS, THEFT, VANDALISM OR SUSPICIOUS ACTIONS WITHIN HEADQUARTERS ACTIVITIES

1. Purpose
2. Policy
3. Limitations
4. Definitions
5. Responsibilities

Attachment A—GSA Form 3155—
Offense/Incident Report

1. *PURPOSE.* To establish uniform procedures and provide guidance for reporting losses, thefts, acts of vandalism, or suspicious actions within Headquarters activities.

2. *POLICY.* All losses or thefts of (Personal) Government or private property, all acts of vandalism, and all suspicious actions should be reported as soon as possible.

3. *LIMITATIONS.* Nothing contained herein will alter or change requirements established in Staff Manual Guide FDA 2620.2—Accounting and Inventory Controls for Property Assigned to Custodial Areas.

4. *DEFINITIONS.*

a. *Personal Property.* Government property of any kind or interest therein, except real property and records of the Federal Government. For the purpose of clarity in this staff manual guide. "Personal Property" will be referred to as "Government Property."

b. *Private Property.* Any item(s), belonging to an employee or visitor, which would include wallets, purses, wall hangings, plants, etc. This *does not* include accountable government property assigned to an employee.

5. *RESPONSIBILITIES.*

a. *All Employees*:

(1) For purposes of security, regard your workspace and office suite as your "home" and note any strange or suspicious persons or incidents taking place.

(2) If you see an unknown individual in your office area, ask what their business is and whom they are there to see. If they are picking up government materials for which the agency is responsible, ask them to verify their identity and need for the material. If government property is being taken out of the building for repair, ensure that an OF-7 (Property Pass) has been issued and signed by an authorized FDA employee.

(3) If in doubt as to the need or nature of a person's presence in the area or of the actions taking place, immediately report the situation to your supervisor. IF IT IS AN EMER-

GENCY, (CRIME IN PROGRESS), SUMMON THE GUARD FORCE OR LOCAL LAW ENFORCEMENT AGENCIES, IF APPLICABLE. *DO NOT ATTEMPT TO USE PHYSICAL FORCE ON ANY SUSPECT.*

(4) When reporting an incident to the guard force or local law enforcement agency, please note distinguishing features of the person about whom you are suspicious, such as: height, weight, complexion, hair color and style, facial hair (beard, mustache), eyes (glasses, color), clothing (color of shirt, pants, dress, fabric, style), shoes (style, color), and other distingiushing marks or articles (body scars, tattoos, jewelry).

(5) If applicable, note color, type and make of vehicle, being used by a suspect and license number, if obtainable.

(6) Threatening phone calls, i.e. (bomb threats or acts of violence) should be reported to your supervisor and to the guard force or local law enforcement agency *IMMEDIATELY*. A log should be kept of all calls received. Try to distinguish voice patterns, background noises, etc., establish date and time that call(s) is received.

(7) Notify your supervisor immediately upon discovering a loss or theft. If assistance is required to determine serial numbers, property description, or purchase order information for government property, contact the Personnel Property Management Section, HFA-225.

(8) Attachment A, GSA Form 3155 (Offense/Incident Report) will be completed by guard or GSA Federal Protective Service, where applicable, for any loss or theft of government property. Cooperate with law enforcement authorities investigating the incident.

(9) Use the following measures to deter thefts and losses:

(a) Do not leave wallets, change-purses, pocketbooks, or other personal valuables unattended at *any* time. If you must leave your office area, lock the item in a desk or file cabinet.

(b) Wardrobes or other receptacles for coats or other items of clothing should not be located near a corridor door.

(c) Do not leave coins or stamps in an unlocked desk drawer.

(d) Coffee funds or monies collected for in-house gifts, luncheons, etc., should be controlled by one individual and locked in a secured container *at all times.* Keys to the secured container should not be left in an unlocked desk or cabinet.

(e) Easily portable government property which has been assigned to an employee also requires protection from theft. Items such as hand-held calculators, dictating machines, tape recorders, cameras, etc., should *always* be secured in a locked desk or file cabinet when not in use. Where pilferable items cannot be secured in a locked container, secure the area.

(f) The combination locks on FDA corridor and some interior doors are provided for employees protection and protection of government property. They should be fully utilized. Do not leave office areas unattended and corridor doors unlocked. Door combinations should be kept in a wallet or purse, not in an unlocked desk or in a rolodex file on top of a desk.

If an employee is going to work weekends or during security hours, it is that individual's responsibility to know the combination before entering the space.

b. *Supervisors*:

(1) Shall inform all employees who are working with government property, privacy record systems, and documents containing trade secret or privileged information, of their obligation to protect such materials and of the methods to be used to provide adequate protection.

(2) Stress to employees the need for cooperation with law enforcement authorities.

(3) Ensure that employee has contacted the Personal Property Management Section, HFA-225, when a loss or theft of government property has occurred.

(4) Implement such actions as may be deemed necessary by the FDA Physical Security Staff in order to protect evidence at the scene of an incident.

6. *EMERGENCY OR SECURITY/LAW ENFORCEMENT TELEPHONE NUMBERS.*

a. *Designated Contacts*:

(1) In the event that the guard force or local law enforcement agencies are requested, the following locations and emergency numbers are being provided:

• *PARKLAWN FACILITIES*	*CONTACT*	
Parklawn Building	Parklawn Security Central	443-4144
Park Building	Parklawn Security Central	443-4144
Chapman Building	Parklawn Security Central	443-4144
Twinbrook Complex	Parklawn Security Central	443-4144
CDRH Laboratory	Parklawn Security Central	443-4144
Metro Park North	Parklawn Security Central	443-4144
PCC Tape Storage Vault		
• *SILVER SPRING*		
Silver Spring Plaza	#1. FDA Guard Office	427-7923
	#2. Montgomery Co. Police	(911)
• *BELTSVILLE*		
Agriculture Research Center	Agriculture Police	344-2167
Beltsville Research Facility	U.S. Park Police	344-4250
• *SOUTH WEST COMPLEX—D.C.*		
Federal Building 8 (FB8)	#1. GSA Control Center	472-1111
	#2. HHS Guard	245-1026
Mary E. Switzer	GSA Control Center	472-1111
• *NATIONAL INSTITUTES OF HEALTH*		
Bldgs. #29/29A/14	NIH Guard Office	496-5685

APPENDIX I

STAFF MANUAL GUIDE
FOOD AND DRUG ADMINISTRATION
ORGANIZATION AND DELEGATIONS MANUAL

ORGANIZATION—OFFICE OF MANAGEMENT AND SYSTEMS

OFFICE OF MANAGEMENT

OFFICE OF HUMAN RESOURCES MANAGEMENT

DIVISION OF EMPLOYEE RELATIONS

1. Division of Employee Relations
2. Employee Relations Branch I
3. Employee Relations Branch II
4. Authority and Effective Date

1. DIVISION OF EMPLOYEE RELATIONS (HFA774).

   a. Plans, develops and coordinates implementation of employee relations policies, goals, operating plans, and programs.

   b. Serves as the Agency expert, prepares related documents, and provides advice and assistance on the interpretation, application of legal and regulatory requirements for and processing of adverse, disciplinary, and performance-based actions; appeals and grievances; within-grade increase denials; employee suitability; employee assistance programs; workers' compensation and unemployment compensation claims and appeals; and Freedom of Information (FOI) and Privacy Acts as they relate to personnel records.

c. Coordinates and implements Agencywide programs and initiatives, as the need arises or as requested, e.g., smoke-free workplace policy, drug-free workplace, or AIDS in the workplace. Acts as liaison with Employee Assistance Program managers and personnel who provide services to FDA employees.

d. Evaluates, coordinates, and develops comments on FDA, PHS, HHS, and OPM proposed regulations and procedural issuances dealing with or related to employee relations functions.

e. Establishes and maintains liaison with officials in FDA, PHS, HHS, OPM, and other Federal agencies and outside organizations to keep abreast of human resources management and employee relations programs and practices, and to secure information that may be helpful in making improvements in FDA human resources and employee relations programs and operations.

f. Conducts human resources management evaluation surveys Agencywide, compiles, calculates, and evaluates statistical data; interviews employees and managers and prepares narrative survey reports which presents analyses of data collected.

g. Coordinates the human resources management functions of the HHS drug testing programs.

2. EMPLOYEE RELATIONS BRANCH I (HFA7741).

a. Provides employee relations advisory and case management services for the Center for Devices and Radiological Health, the Center for Biologics Evaluation and Research, the Center for Food Safety and Applied Nutrition, the Center for Veterinary Medicine, and the National Center for Toxicological Research.

b. Prepares or assist in the preparation of notices and documents related to disciplinary, adverse and performance-based actions; appeals and grievances; and within-grade increase denials to ensure technical sufficiency of material and protection of employees' *due process rights.*

e. Counsels FDA employees on personnel matters related to employee relations in an effort to resolve employees' concerns.

d. Prepares responses to and represents the Agency before the Merit Systems Protection Board (MSPB) on appeals. Prepares, coordinates and provides technical assistance for Agency cases on formal employee appeals made to other, or higher, authorities.

e. Conducts special studies, as needed or requested, on employees relations problems and programs.

f. Oversees and coordinates the Agency's suitability program, including processing of determinations related to National Agency Check and Inquiry (NACI) clearances and retention of Federal employees.

g. Researches and compiles information and responds to FOI and Privacy Act requests for personnel records.

h. Provides advice and assistance to employees and managers, coordinates processing of workers' compensation claims and prepares Agency's case in controverting questionable claims.

i. Assures proper documentation in all separation claims consistent with the Unemployment Compensation for Federal Employees Law and pre-

pares and presents Agency cases before State employment security agencies.

3. EMPLOYEE RELATIONS BRANCH II (HFA7742).

   a. Performs the same functions as 2. a. for the Office of the Commissioner, the Office of Policy, the Office of External Affairs, the Office of Management and Systems, the Immediate Office of the Office of Operations, the Office of Regulatory Affairs, and the Center for Drug Evaluation and Research. Provides advisory services and support assistance to DHHS Regional Personnel Offices and the FDA Field Offices upon request.

   b. Performs the same functions as 2. b.-i.

4. AUTHORITY AND EFFECTIVE DATE.

   The functional statements for this Division were approved by the Associate Commissioner for Management on June 8, 1993.

APPENDIX J

FDA ETHICS GUIDE

Subpart M—Reporting Violations

§ 73.735-1301 Responsibility for reporting possible criminal violations.

An employee who has information which he or she reasonably believes indicates a possible offense against the United States by an employee of the Department, or any other individual working on behalf of the Department, shall immediately report such information to his or her supervisor, any management official, or directly to the Office of the Inspector General. Offenses covered by the preceding sentence include, but are not limited to, bribery, fraud, perjury, conflict of interest, misuse of funds, equipment, or facilities, and other conduct, by a government officer or employee, grantee, contractor or other person which is prohibited by title 18 of the United States Code. Employees and supervisors should refer to chapter 5-10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information.

§ 73.735-1302 Responsibility for reporting allegations of misconduct.

An employee who has information which he or she reasonably believes indicates the existence of an activity constituting (1) a possible violation of a rule or regulation of the Department; or (2) mismanagement, a gross waste of funds, or abuse of authority; or (3) a substantial and specific danger to the public health and safety, shall immediately report such information to his or her supervisor, any management official of the Department or directly to the Office of the Inspector General. Employees and supervisors should refer to chapter 5-10 of the Department's

General Administration Manual for procedures regarding the reporting and handling of such information. This subsection does not cover employee grievances, equal employment opportunity complaints, classification appeals, or other matters for which a formal government-wide review system has been established by the Federal government.

§ 73.735-1303 Prohibition of reprisals.

(a) Any employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or providing any information pursuant to § 73.735-1301 and 1302. If the complaint was made or the information was disclosed with the knowledge that it was false, or with willful disregard of its truth or falsity, any personnel action taken against the employee based on those reasons would not constitute a reprisal action.

(b) An employee who believes that he or she has been threatened with a personnel action, any other action, or harassment or has been harmed by any action as a reprisal for having made a complaint or providing information pursuant to § 73.735-1301 or 1302 may request the Office of the Inspector General to review his or her allegations. Whenever the Inspector General has reason to believe that the allegations may be true, he or she will refer the matter to the Assistant Secretary for Personnel Administration for appropriate action. The Assistant Secretary for Personnel Administration may order a stay of any personnel action if he or she determines that there are reasonable grounds to believe that the personnel action is being taken as a reprisal for making a complaint or providing information pursuant to § 73.735-1301 or 1302.

§ 73.735-1304 Referral of matters arising under the standards of this part.

(a) The Department Ethics Counselor may refer to the Inspector General for investigation and/or further action any matter arising under the standards of this Part.

(b) The Department Ethics Counselor may refer to the Office of Government Ethics, or the Inspector General may refer to the Department of Justice, suspected violations of the criminal laws regarding employee standards of conduct and conflicts of interest.

APPENDIX K

5 C.F.R. 752.404—Crime Provision

§ 752.404 Procedures.

(a) *Statutory entitlements.* An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(b) *Notice of proposed action.* (1) The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The agency may not use material that cannot be disclosed to the employee of his or her representative or designated physician under § 297.204(c) of this chapter to support the reasons in the notice.

(2) When some but not all employees in a given competitive level are being furloughed, the notice of proposal shall state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(3) Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed shall remain in a duty status in his or her regular position during the advance notice period. In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

(i) Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;

(ii) Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;

(iii) Curtailing the notice period when the agency can invoke the provisions of § 752.404(d)(1) of this part, the "crime provision." This provision may be invoked even in the absence of judicial action if the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed; or

(iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

(c) *Employee's answer.* (1) The agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in an active duty status.

(d) *Exceptions.* (1) Section 7513(b) of title 5 of the United States Code authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension (including indefinite suspension). The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer, within such time as would be reasonable, but not less than 7 days. When the circumstances require that the employee be kept away from the worksite, the agency may place him or her in a nonduty status with pay for such time as is necessary to effect the action.

(2) The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

APPENDIX L

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

Title 18 U.S.C.S. § 1001 provides as follows:

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowing and

willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under any order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or col-

lected, or any penalty claimed to have been collected without authority of any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accuring on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee

of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

(June 25, 1948, c. 646, 62 Stat. 982; May 24, 1949, c. 139, § 124, 63 Stat. 106; July 18, 1966, Pub.L. 89-506, § 8, 80 Stat. 307; Dec. 29, 1981, Pub.L. 97-124, § 1, 95 Stat. 1666; Nov. 18, 1988; Pub.L. 100-694, § 3, 102 Stat. 4564.)

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

(June 25, 1948, c. 646, 62 Stat. 983; Nov. 18, 1988, Pub.L. 100-694, §§ 4, 9(c), 102 Stat. 4564, 4567.)

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against

the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification of the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States

under the provisions of this title and all references thereof, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which

it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539; July 18, 1966, Pub.L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, Pub.L. 100-694, §§ 5, 6, 102 Stat. 4564.)

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation,

deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officers" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activiites of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

(June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86-168, Title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, Pub.L. 93-253, § 2, 88 Stat. 50.)